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17 *Attorneys for Defendants*

18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 OAKLAND DIVISION

21 REARDEN LLC et al.,
 Plaintiffs,
 22 vs.
 23 THE WALT DISNEY COMPANY et al.,
 Defendants,
 24 REARDEN LLC et al.,
 25 Plaintiffs,
 26 vs.
 27 TWENTIETH CENTURY FOX FILM
 CORPORATION et al.,
 28 Defendants.

Case Nos. 4:17-cv-04006-JST
 4:17-cv-04191-JST

**NOTICE OF MOTIONS AND MOTIONS
 FOR SUMMARY JUDGMENT ON
 CAUSAL NEXUS ISSUE**

Judge: Hon. Jon S. Tigar
 Date: To be set
 Time: To be set

Ctrm.: 6 (2nd Floor)

1 **NOTICE OF MOTIONS AND MOTIONS FOR SUMMARY JUDGMENT**

2 To Plaintiffs Rearden LLC and Rearden MOVA LLC (“Rearden”) and their counsel of
3 record:

4 PLEASE TAKE NOTICE that on a date to be scheduled by further Court Order, or as soon
5 thereafter as the matter may be heard, in Courtroom No. 6 of the above-captioned Court, located at
6 1301 Clay Street, Oakland, CA 94612, all defendants in Case No. 4:17-cv-04006-JST (The Walt
7 Disney Company, Walt Disney Motion Pictures Group, Inc., Buena Vista Home Entertainment,
8 Inc., Marvel Studios, LLC, and Mandeville Films, Inc.) (collectively, “Disney”), and both
9 defendants in Case No. 4:17-cv-04191-JST (Twentieth Century Fox Film Corporation and
10 Twentieth Century Fox Home Entertainment LLC) (jointly, “Fox”) (Disney and Fox are referred
11 to collectively as “Defendants” or “Studios”), will and hereby do move the Court for an Order
12 granting Defendants partial summary judgment on Rearden’s First and Second Causes of Action
13 against Disney, and Rearden’s First Cause of Action against Fox. Specifically, Defendants move
14 for an Order holding that Rearden may not obtain as damages under 17 U.S.C. § 504(b) any
15 portion of the Studios’ profits from the at-issue motion pictures (the “Motion Pictures”)—
16 so-called “indirect profits”—on the ground that Rearden as a matter of law cannot establish a
17 causal nexus between the alleged copyright infringement and those profits.

18 These Motions are based upon these Notices of Motions and Motions; the attached
19 Memorandum of Points and Authorities¹; the contemporaneously filed Declarations of Vincent
20 Cirelli, Joe Conmy, Danielle Costa, Darren Hendler, Todd Isroelit, Gregory LaSalle, Patrick
21 Ledda, Hao Li, Mike Mulvihill, Erik Nash, Jonathan Rothbart, Mimi Steele, and Teresa Reed
22 Dippo; all other materials supporting these Motions and the Reply brief filed or manually lodged
23 in support thereof; all pleadings on file in this matter; and any other materials or arguments the
24 Court may receive at or before the hearing on these Motions.

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26
27
28 ¹ Defined terms in these Notices of Motions and Motions (e.g., “Rearden” or “Studios”) are also
used in the accompanying Memorandum of Points and Authorities.

1 DATED: October 14, 2020

MUNGER, TOLLES & OLSON LLP

2
3 By: /s/ Ginger D. Anders
4 GINGER D. ANDERS

5 *Attorneys for Defendants*
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INTRODUCTION

Rearden has the substantial burden of establishing with non-speculative evidence a causal nexus between the alleged infringement (the copying of MOVA code into computer random access memory (“RAM”)) and revenues the Studios earned from the Motion Pictures. Countless components contribute to the production of a major motion picture like each at issue here, and many factors influence the decisions of consumers to see it. It is difficult to imagine any plaintiff establishing a causal nexus between a software tool used behind the scenes in the production process and motion picture revenue sufficient to entitle the plaintiff to an award of indirect profits. Rearden cannot do so here. Its remedy, if any, is not a portion of any Motion Picture’s profits but the recovery of lost revenue—most accurately measured by what Rearden charged customers for MOVA services or vendors for a license—or statutory damages under 17 U.S.C. § 504(c).

Rearden cannot allege that the Motion Pictures directly infringe Rearden’s copyright because the Court rejected Rearden’s claim to have a copyright in any MOVA “output files.” Rearden’s copyright claim is therefore limited to secondary infringement based on a narrow infringing act: copying by visual effects vendor Digital Domain 3.0 (“DD3”) of pieces of MOVA software code into RAM while recording facial performances and processing recorded data into the output files. Neither the temporary copies of code nor the output files appeared in any Motion Picture or were ever visible to anyone who saw any Motion Picture or any advertisement for the same. Rearden cannot show that the copies of code, which are temporary mechanical byproducts of the software’s use, caused consumers to choose to see the Motion Pictures.

There are limitless reasons why consumers pay to see any particular motion picture, including (among many others) stars, script, costumes, and music. It is highly speculative to say which of these factors lead people to pay to see a motion picture, but at least these are things that consumers actually see visually or hear aloud. Rearden has no evidence that consumers decided to see any of the Motion Pictures at issue here because a third-party vendor, months (or more) before the Motion Picture’s release, made temporary RAM copies of software that no consumer saw.

Rearden tries to resurrect claims this Court already dismissed by posting images of actors with facial makeup next to the completed heads of computer-generated (“CG”) characters, thereby

1 attempting to suggest that MOVA magically transformed each actor into a CG character and so
 2 drove consumers' purchasing decisions.¹ In fact, MOVA plays a vanishingly small, principally
 3 time-saving role in the long and complex process of animating a CG character's facial movements
 4 in certain scenes. The MOVA software's only role is to record an actor's facial movements and
 5 process computer data on their geometric coordinates over time. Other non-MOVA software is
 6 required to port the facial movements to a CG model, and graphic artists invest countless hours
 7 fine-tuning those movements to better match the CG character's face (particularly when the CG
 8 character's face is not proportionate to the actor's) and creating all the other elements that go into
 9 the face, including eyes, tongue, skin, hair, and many others. And even the completed *face*, which
 10 is far removed from software residing in RAM, is just one part of one character, which itself is just
 11 one part of a scene, which is just one part of the motion picture customers pay to see. DD3's
 12 copying of MOVA software has no causal nexus to the Motion Pictures' profits.

13 Rearden's indirect profits claim confuses liability under patent and copyright law.
 14 Rearden's claim is not based on DD3's *copying* of the MOVA software into RAM through a
 15 routine computer operation, but on the *use* of that software, which is protected (if at all) by patent
 16 law.² Had Rearden maintained and proved its patent claims, rather than dismissing them,³
 17 Rearden might have been able to seek damages based on the use of the software. But Rearden's
 18 remedies under patent law would not include claims to the Motion Pictures' profits. Instead,
 19 damages would be limited to a reasonable royalty or perhaps amounts saved by DD3's use of
 20 MOVA relative to the use of another software tool or no facial motion capture technology at all—
 21 which is presumably the reason Rearden dismissed its patent claims.

22 The Ninth Circuit has said that eliminating meritless indirect profits claims “obviates a
 23 good deal of mischief.” *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 711 (9th Cir.
 24
 25

26 ¹ See First Amended Complaint (“FAC”) ¶¶ 37–42 (Mar. 6, 2018), Dkt. 63. References to docket
 27 entry numbers in this Motion are to Case No. 17-CV-04006. Corresponding entries (with different
 docket entry numbers) are in Case No. 17-CV-04191.

28 ² Patent law provides liability for the unauthorized making, *using*, or selling of a product or
 process covered by the claim(s) of a patent. 35 U.S.C. § 154(a)(1).

³ Dkt. 93.

2004) (quoting 4 Nimmer on Copyright § 14.03[B], at 14–39). Rearden’s indirect profits claim is mischief in the extreme. The Court should dismiss Rearden’s claim for indirect profits.

BACKGROUND

I. THE LEGAL FRAMEWORK FOR REARDEN’S INDIRECT PROFITS CLAIM

Section 504(b) of the Copyright Act authorizes the recovery of actual damages or “profits of the infringer that are attributable to the infringement.” 17 U.S.C. § 504(b). The law recognizes two types of profit claims. Direct profits come from the sale of the infringing copy. *Mackie v. Reiser*, 296 F.3d 909, 914 (9th Cir. 2002). Here, direct profits would be (at most) the amounts that DD3 invoiced for using MOVA. DD3’s invoices (including out-of-pocket costs) were for sums that would not justify the expense of this litigation.⁴

Rearden thus seeks “indirect profits,” i.e., “revenue that has a more attenuated nexus to the infringement.” *Mackie*, 296 F.3d at 914. The alleged infringing act is the creation of an unauthorized copy of MOVA software code residing in computers that third-party vendor DD3 operated. Based on that act—which took place early in the production process, before armies of visual effects artists, engineers, and others crafted the character and performance that eventually appeared on screen—Rearden seeks a portion of the finished Motion Pictures’ profits.

Mindful that this remedy incentivizes plaintiffs to “shoot the moon,” courts impose strict gating requirements for indirect profits claims. It is “particularly important for the plaintiff in [an] indirect profit action to demonstrate the alleged causal link between the infringement and the profits sought.” *Polar Bear Prods.*, 384 F.3d at 711 n.7. Ninth Circuit law is clear that:

[T]o survive summary judgment on a demand for indirect profits pursuant to § 504(b), a copyright holder must proffer sufficient non-speculative evidence to support a causal relationship between the infringement and the profits generated indirectly from such an infringement.

Mackie, 296 F.3d at 915–16.

That burden is significant. The plaintiff must show, through concrete evidence, that the infringement increased the revenue earned by the infringer. *Id.* at 911 (requiring “a link between

⁴ See Steele Decl. ¶ 5; Costa Decl. ¶¶ 4–5; LaSalle Decl. ¶ 8; Conmy Decl. ¶ 5; see also Costa Decl. ¶ 6 (listing amount for visual effects provided by entity Rearden allegedly controlled for motion picture produced in 2012); Isroelit Decl. ¶ 4 (same for motion picture produced in 2009).

1 the infringement and the [defendant’s] supposedly enhanced revenues”); *Dash v. Mayweather*, 731
 2 F.3d 303, 332 & n.18 (4th Cir. 2013) (indirect profits claim could not survive summary judgment
 3 because plaintiff had “no evidence that the [infringing] playing of the [copyrighted] song ...
 4 increased any of [defendant’s] revenue streams”).

5 A plaintiff’s indirect profits theory is amenable to testing on summary judgment. Because
 6 the causation inquiry is rigorous and indirect profits claims are often attenuated, such claims often
 7 do not survive summary judgment. 4 Nimmer on Copyright § 14.03[B][2][b], at p. 14 (such
 8 claims “are more frequently unsuccessful”); see *IBM Corp. v. BGC Partners, Inc.*, No. 10 Civ.
 9 128 (PAC), 2013 WL 1775437, at *3 (S.D.N.Y. Apr. 25, 2013) (“Because of the at-best highly
 10 speculative nature of all indirect profits claims ... the decision to send such claims to a jury should
 11 be extremely rare.”) (quoting 6 William F. Patry, *Patry on Copyright* § 22:131 (2010)) (alteration
 12 omitted). The Ninth Circuit and many other courts have granted summary judgment where the
 13 plaintiff is unable to proffer non-speculative evidence that the infringement increased revenues.⁵

14 *Mackie* demonstrates why Rearden’s claim for indirect profits cannot survive summary
 15 judgment. The district court there rejected such a claim where the defendant made an infringing
 16 copy of plaintiff’s artwork and used it on one page of a 24-page promotional brochure mailed to
 17 150,000 potential ticket buyers of the Seattle Symphony. The page with the infringing artwork
 18 directly followed a page containing information about an upcoming series called “Pops.” The
 19 plaintiff sought a share of the Symphony’s profits from the Pops series based on the inclusion of
 20 his artwork in the brochure.

21 The Ninth Circuit affirmed summary judgment on the indirect profits claim because there

23 ⁵ See, e.g., *Mackie*, 296 F.3d 909 (affirming grant of summary judgment where evidence of
 24 causation was speculative); *Dash*, 731 F.3d at 332 & n.18 (affirming grant of summary judgment
 25 where plaintiff had “no evidence that the playing of the [infringing] song ... increased any of
 26 [defendant’s] revenue streams”); *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 520
 27 (4th Cir. 2003) (affirming grant of summary judgment where plaintiff offered only speculation
 28 that use of infringing logo caused increased merchandise sales); *Thale v. Apple, Inc.*, No. C-11-
 03778-YGR, 2013 WL 3245170, at *7–9 (N.D. Cal. June 26, 2013) (granting summary judgment
 where plaintiff “proffered no evidence that the use of the [infringing] Photo caused any iPhone
 3GS sales, nor that the “Concert” commercial did itself”); *New Show Studios, LLC v. Needle*, No.
 2:14-cv-01250-CAS (MRWx), 2016 WL 5213903, at *9 (C.D. Cal. Sept. 20, 2016) (granting
 summary judgment where plaintiff “ha[d] not offered any non-speculative evidence that the
 [infringing] videos” included in defendant’s advertising portfolio “generated profits”).

1 were “virtually endless” reasons that people might purchase tickets to the Pops series: “For
 2 example, was it because of the Symphony’s reputation, or the conductor, or a specific musician, or
 3 the dates of the concerts, or the new symphony hall, or the program, or the featured composers, or
 4 community boosterism, or simply a love of music, or ... ?” *Mackie*, 296 F.3d at 916. The
 5 plaintiff’s expert asserted that some people likely bought tickets as the result of seeing the
 6 infringing artwork. The Ninth Circuit rejected this argument for the fundamental reason that there
 7 are numerous reasons why people would buy Symphony tickets: “In the absence of concrete
 8 evidence, [plaintiff’s] theory is no less speculative than our effort ... to enumerate even a
 9 relatively short list of the myriad factors that could influence an individual’s purchasing
 10 decisions.” *Id.*

11 The causal link between infringement and revenues in *Mackie* was closer than that Rearden
 12 attempts to establish here. In *Mackie*, consumers at least saw the infringing copies in the
 13 promotional brochure. Here, consumers who paid to see the Motion Pictures did not see any
 14 copied MOVA code, or even any output file (in which Rearden has no copyright). As in *Mackie*,
 15 the number of factors here influencing a moviegoer’s decision to purchase a ticket are so varied
 16 that any attenuated link to MOVA would be pure speculation.

17 **II. PROCEDURAL HISTORY UNDERLYING THIS MOTION**

18 The Court granted Defendants leave to file this motion in December 2018.⁶ Defendants
 19 first moved for summary judgment on February 28, 2019. Rearden’s response has been delayed
 20 while it has taken an extraordinary amount of discovery on the causal nexus issue. Having
 21 conducted that discovery, Rearden still has no evidence showing a non-speculative nexus between
 22 DD3’s temporary copying of MOVA code and Motion Picture revenues.

23 **III. FACTUAL BACKGROUND**

24 Rearden’s complaints vastly overstate MOVA’s role, reprinting images from its marketing
 25 materials to make it appear that going from the performance capture, to the tracked mesh, to a
 26 completed CG character proceeds 1-2-3.⁷ In reality, the special effects process of creating a CG
 27

28 ⁶ Dkt. 128.

⁷ FAC ¶¶ 37–42.

1 character is far more complex than that. MOVA software's role in the process of creating just the
 2 *facial motion* of a single CG character is preliminary and miniscule. In terms of creating an entire
 3 motion picture, the software's significance is dwarfed by countless creative ingredients.

4 **A. The First, And Only, Step Involving The Alleged Infringement: Temporary**
 5 **Copies Of MOVA Software Code Are Created In RAM**

6 The alleged copyright infringement is narrow. Specifically, Rearden alleges that when
 7 third-party visual effects vendor DD3 launched the MOVA system at the start of a motion-capture
 8 or data-processing session, pieces of MOVA software code were temporarily copied from the
 9 computer's hard drive into the computer's RAM.⁸ Other than the temporary copying of the
 10 MOVA software code through a routine computer operation, there is no alleged exercise of the
 11 exclusive rights of copyright, 17 U.S.C. § 106, and there is nothing more to the alleged
 12 infringement. Rearden tried to allege that it had a copyright interest in the output files, but the
 13 Court dismissed that claim at the outset of the case.⁹

14 **B. The Next Step—Producing The Tracked Mesh—Requires Human**
 15 **Involvement**

16 The MOVA processes of recording an actor's facial movements and generating data points
 17 can take only a few hours. The process of taking the resulting information from the face capture
 18 and creating a CG character involves the use of *non*-MOVA software tools and substantial human
 19 artistry, and takes thousands of hours over a period of months.¹⁰

20 1. During face capture, the MOVA code necessary for the relevant software operation
 21 resides in RAM. The code provides instructions to the physical machinery (cameras and lights)
 22 for the strobing of visible and ultraviolet ("UV") lights and recording and synchronizing the data.
 23 The actor, wearing phosphorescent makeup (visible only under UV light), sits or stands in the
 24 physical MOVA apparatus and provides the performance. A supervisor directs the actor's facial
 25 performance. Li Decl. ¶¶ 13–17.

26
 27 ⁸ *Id.* ¶¶ 99, 107, 115, 129.

⁹ Dismissal Order at 7–8, Dkt. 60.

28 ¹⁰ *See, e.g.*, Li Decl. ¶ 26; Cirelli Decl. ¶ 10; Rothbart Decl. ¶¶ 9–17; LaSalle Decl. ¶ 8; Steele
 Decl. ¶ 4; Hendler Decl. *passim*.

2. During data processing, the temporary copies of MOVA code again reside in RAM and provide instructions, most notably to assist with generating an output file called the “tracked mesh.” The tracked mesh is a collection of data following the position of various points on the face in three dimensions over time. *Id.* ¶¶ 18–19.

The tracked mesh is created by processing other facial motion data called the “point cloud.” First, each frame of the actor’s performance is translated into a “point cloud.” The point cloud is the actor’s face represented by thousands of coordinates along three dimensions (x, y, and z axes) in space. Visualized on a computer display, the point cloud appears as a collection of dots arranged in a 3D form covering the major regions of the face. *Id.* ¶ 19.

Second, the tracked mesh is produced by processing the point cloud data. MOVA software supplies an algorithm that tracks specific points on the face across time to produce the tracked mesh. The tracked mesh is a collection of data specifying particular 3D coordinates that permit consistent tracking of the motion of the actor’s face. If visualized on a computer display, the tracked mesh shows as a facial mask. The data of the tracked mesh plots points only on the face (not the top or back of the head, including hair, or the ears), and excludes critical regions of the face, such as the teeth, tongue, eyes, skin around the eyes, and part of the lips. *Id.* ¶¶ 19–20.

Below is a render of tracked mesh output data, shown side-by-side with the corresponding facial performance of Dan Stevens, who played the Beast in *Beauty and the Beast*. Hendler Decl. ¶ 27.



Human involvement goes into the data processing required to create the tracked mesh. The MOVA algorithm is complex but not robust enough to accurately track complex facial movement or produce a perfectly accurate tracked mesh. The tracked mesh output file would be unusable without human intervention to supplement and correct the tracking. Li Decl. ¶ 20c.

The output files—in which Rearden has no copyright—are the point cloud, the tracked mesh, and the raw video footage of the actor’s performance. The tracked mesh is most relevant to the process of animating a CG character, whereas the video footage and point cloud may be used as reference material. *Id.* ¶ 21. No output file is alleged to be an infringing copy.

MOVA was not the only software program that could be used for capturing facial motion performance or in the creation of a tracked mesh. Industrial Light & Magic, Weta Digital, and Di4D also provided comparable facial motion performance capture software.¹¹

C. The Next Step—Creating The Facial “Rig”—Does Not Involve Copies Of MOVA Software Code

The tracked mesh is only a set of data points. To create a CG character, digital artists must separately create a 3D animation model of the character’s face, to which the data can be applied to help create facial motion. This model, called a “rig,” is like a facial puppet that can be manipulated to perform a range of facial expressions. Li Decl. ¶ 21. The rig is typically hand-crafted by animators, with assistance from non-MOVA software, and is imbued with stylistic and artistic choices. *Id.* ¶ 22; *see, e.g.*, Rothbart Decl. ¶ 11; Hendler Decl. ¶ 13. Below are three images of rigs of the character “Thanos” from *Guardians of the Galaxy* and *Avengers: Age of Ultron*: (a) at top, the Thanos rig performing a variety of hand-crafted facial expressions; (b) below and on the left, a close-up Thanos rig with a neutral facial expression; and (c) below and on the right, a close-up Thanos rig with a different facial expression. The appearance of the rig in the images below is the result of non-MOVA artistry and techniques. Cirelli Decl. ¶ 5.

¹¹ *See* Reed Dippo Decl. Ex. E (Li Dep. Tr. 81:18–25, 82:21–23, 86:17–22); Ex. F (Steele Dep. Tr. 124:8–125:2); Ex. D (Hendler Dep. Tr. 31:8–32:4; 89:20–91:2; 109:2–9); Hendler Decl. ¶¶ 25, 47; Steele Decl. ¶ 3.



The desired facial performance is then mapped onto the rig in a process that requires additional non-MOVA software, and does not involve copies of MOVA software code. Li Decl. ¶ 24. The tracked mesh supplies data points that reflect the facial *motion* from the actor's performance. But the tracked mesh typically cannot be directly applied to the facial rig because the (frequently inhuman) CG characters are often very differently proportioned from the human actors—Thanos and the Beast being two examples. A one-to-one port would result in unrealistic facial expressions. *See, e.g.*, Cirelli Decl. ¶ 7. Specially designed non-MOVA software is required to translate the coordinates in the tracked mesh to computer parameters that can control

1 the rig's facial movements. Li Decl. ¶ 24. DD3 uses a proprietary software program, "Direct
2 Drive," for this purpose.¹²

3 Digital artists refine the mapped performance on the facial rig for accuracy and stylistic
4 reasons, such as the director's preference for more exaggeration in the facial expression. Altering
5 the rig's facial expression modifies or overwrites the expression reflected in the tracked mesh. Li
6 Decl. ¶ 25; *see also, e.g.*, Steele Decl. ¶ 4. This further delinks the facial rig from the tracked
7 mesh data that MOVA generates. For any shots that use data from the tracked mesh, animators
8 must add the movement of the eye and lip regions, which are not included in the tracked mesh, to
9 the mapped performance. Li Decl. ¶ 25; Cirelli Decl. ¶ 6; LaSalle Decl. ¶ 5. Moreover, the
10 tracked mesh supplies data only for shots based on the actor's facial performance in the MOVA
11 apparatus. Other shots do not involve MOVA data, such as shots based on manually created
12 expressions. *See, e.g.*, Cirelli Decl. ¶ 6; Li Decl. ¶ 25; Hendler Decl. ¶ 17.

13 **D. Innumerable Additional Steps (None Of Which Involve Copies Of The MOVA**
14 **Software Code) Are Required To Create The CG Character**

15 The completed facial rig is not the completed CG character. Hundreds or even thousands
16 of hours of human labor and artistry are still needed to transform the rig into the face of the on-
17 screen CG character. These later stages may be broken down into three broad categories, none of
18 which involves MOVA software and each of which can take weeks or months to complete:

- 19 • *Modeling.* The face must be developed with color, texture, shading, hair, and other
20 details. A photoreal CG face includes pore-level details, skin tone and color,
21 changes in texture (e.g., wrinkles for particular expressions), and changes in skin
22 tone based on emotion (e.g., blood flow to the cheeks to depict anger). Each detail
23 must be designed through manual artistry or other techniques that do not involve
24 MOVA and then must be layered onto the facial rig. Li Decl. ¶ 26a; *see, e.g.*,
25 Steele Decl. ¶ 4. The images below are examples from the processes of modeling

26 ¹² LaSalle Decl. ¶ 5; Steele Decl. ¶ 3; *see also* Cirelli Decl. ¶¶ 6–7 (special effects studio for
27 *Guardians of the Galaxy* and *Avengers: Age of Ultron* developed proprietary "Face2Face"
28 software for this purpose); Ledda Decl. ¶¶ 4–5 (facial motion data was too different from target
CG character to warrant creating software script to translate MOVA data to rig); Hendler Decl.
¶ 25.

the face of Thanos, specifically (a) layering hand-painted textures onto Thanos's face using non-MOVA modeling software; and (b) modeling facial hair onto Thanos's face. Cirelli Decl. ¶ 8a.



- *Animation.* Facial movement must be developed with manual animation for certain kinds of movement that cannot be created from the actor's facial performance. Examples include movement that results from contact between a face and another object (e.g., the punching of a face), or secondary facial motion caused by the character's movement (e.g., jiggling when jumping or shaking the head). To reproduce this movement, a technical director or animator will use computer parameters to simulate the particular movement, essentially employing a trial and error process until it "looks right." Once the computer parameters are satisfactory, the simulation may still require further refinement based on the artistic preference of the production team. Li Decl. ¶ 26b. Below is a sample from the process of refining the movement of Thanos's facial skin by hand. Cirelli Decl. ¶ 8b.



- Rendering.* The culmination of all the steps described above is a 3D version of the character's face, visible only on a computer using appropriate 3D-viewer software. This 3D version must be converted into a 2D image that can be incorporated into a final motion picture through a process called rendering. Rendering combines all of the facial components: the shape and motion of the face, the color, the texture, the shading, and other attributes. This involves months of effort by an entire team of specialized digital artists. The rendering process is extremely complex, requiring, among many other things, the incorporation of the realistic reflection of light onto the entire scene. MOVA software is not involved in this process. Li Decl. ¶ 26c; *see, e.g.*, Rothbart Decl. ¶¶ 14–16. The images below are (a) on the left, a sample from the process of perfecting the light reflected on Thanos's face; and (b) on the right, four sample images that show a few of the different visualizations of the Thanos face involved in the rendering process. Cirelli Decl. ¶ 8c.



- The image below shows the final onscreen version of Thanos's face, lacking even a shadow of resemblance to a tracked mesh. Cirelli Decl. ¶ 9.¹³



E. Countless Additional Steps Are Required To Complete A CG Character—And An Entire Motion Picture

The undertakings described above are required just to produce the CG character's *face*. The character's body does not rely on the facial performance: technicians conduct a separate full-body capture session, which may require performances by one or more actors or stunt doubles; body skeletons may need to be built for models; and the actor's movement must be retargeted to the skeleton of the CG character. The development of the character's voice may also require hours of additional work, including a separate voice performance. Li Decl. ¶ 28; *see also* Rothbart Decl. ¶¶ 4–10.

The work of creating a single CG character is just one small part in completing the overall motion picture. That character must be integrated into the full-length footage, which includes the performances of many actors. For several of the Motion Pictures in suit, the CG character in issue appeared on screen for mere seconds: In *Avengers: Age of Ultron*, "Thanos" appears only *in the closing credits* and for just over four seconds of the Motion Picture's 141 minutes. Costa Decl. ¶ 2. In *Guardians of the Galaxy*, Thanos appears on screen for 39 seconds of the Motion

¹³ *See also* Hendler Decl. *passim* (illustrating the many steps in developing the Beast that had nothing to do with MOVA, and the vast difference between the tracked mesh output data and final rendering of the Beast).

1 Picture's two hours. *Id.* And in *Night at the Museum: Secret of the Tomb*, the talking bust of
 2 Augustus Caesar appears on screen for approximately 11 seconds of the Motion Picture's 98
 3 minutes. Nash Decl. ¶ 4. Even in Motion Pictures where the character had longer screen time,
 4 many other characters were critical to the story and consumer interest. In *Beauty and the Beast*,
 5 for example, other popular characters include Belle, Gaston, Mrs. Potts, Chip, Lumiere, and
 6 Cogsworth.

7 The characters alone do not constitute a completed motion picture, which requires a script
 8 for all the action and dialogue, as well as a director and hundreds of other creative and technical
 9 personnel. Motion pictures also include elaborate sets (e.g., creating the French village, and Paris
 10 itself, in *Beauty and the Beast*); costumes (such as wardrobes evocative of 18th-century France);
 11 music ("Be Our Guest"); and visual effects (everything from talking teapots and other household
 12 objects to CG wolves). Innumerable elements go into creating a motion picture.¹⁴

13 The amounts paid for the facial motion capture process underscore the limited role of the
 14 MOVA software in the production process. DD3's invoices for its facial capture services (which
 15 encompassed more than just the use of the MOVA software) constituted a tiny fraction of DD3's
 16 overall special effects work, and an even smaller fraction of the overall special effects budgets for
 17 the Motion Pictures.¹⁵

18 ARGUMENT

19 Summary judgment is appropriate when a "movant shows that there is no genuine dispute
 20 as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
 21 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). "A dispute is genuine only
 22 if there is sufficient evidence for a reasonable trier of fact to resolve the issue in the nonmovant's
 23 favor, and a fact is material only if it might affect the outcome of the case." *LivePerson, Inc. v.*

24
 25
 26 ¹⁴ Defendants have lodged DVD copies of the completed Motion Pictures. *See* Reed Dippo
 27 Decls. ¶¶ 2–4, Exs. A–C (manual filing of Motion Pictures in each respective docket). Defendants
 are also submitting videos, Excel spreadsheets, and files with images illustrating the many steps
 involved in the process of creating shots of the Beast. *See* Hendler Decl. Exs. 1–52.

28 ¹⁵ *See* Costa Decl. ¶¶ 4–5; Conmy Decl. ¶ 5; LaSalle Decl. ¶ 8; Steele Decl. ¶ 5. The DD3
 invoices include the cost of transportation, lodging, and other costs incidental to the use of the
 software and face-capture services.

1 [24]7.ai, Inc., No. 17-cv-01268-JST, 2018 WL 5849025, at *3 (N.D. Cal. Nov. 7, 2018). Where,
 2 as here, the summary judgment motion pertains to “an issue as to which the nonmoving party will
 3 have the burden of proof,” “the movant can prevail merely by pointing out that there is an absence
 4 of evidence to support the nonmoving party’s case.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d
 5 978, 984 (9th Cir. 2007).

6 **I. REARDEN CANNOT SATISFY ITS BURDEN TO SHOW A CAUSAL NEXUS**
 7 **BETWEEN THE INFRINGEMENT AND MOTION PICTURE REVENUES**

8 The Ninth Circuit holds plaintiffs to a substantial burden of presenting concrete, non-
 9 speculative evidence that the alleged infringement drove consumers’ purchasing decisions. For
 10 multiple reasons, this requirement is fatal to Rearden’s indirect profits claim based on DD3’s
 11 temporary copying of MOVA software into computer RAM.

12 **A. Rearden Cannot Show A Causal Nexus Because Consumers Decide To See A**
 13 **Particular Motion Picture For Innumerable Reasons**

14 There are myriad reasons why consumers choose to see a particular motion picture. No
 15 reasonable jury could conclude that there is a causal link between DD3’s temporary RAM copying
 16 of MOVA software and Motion Picture revenues.

17 *Mackie* is squarely on point. The Ninth Circuit held that plaintiff failed to establish a
 18 causal link between the infringing artwork and Symphony revenues because of the innumerable
 19 other reasons why consumers might buy Symphony tickets. Rejecting a claim similar to
 20 Rearden’s here, the court found that the plaintiff’s expert’s opinion could not bridge the gap since
 21 the expert’s analysis could not “determine how many of those individuals subscribed *because of*”
 22 the infringed artwork specifically. *Mackie*, 296 F.3d at 916. Because “the artwork was but one
 23 page in a multi-page brochure that advertised a series of concerts,” the causal “thread” was too
 24 “attenuated” to connect purchasing decisions to the infringement; any such effort would be “[r]ank
 speculation.” *Id.*

25 Similarly, the Fourth Circuit in *Dash* rejected the plaintiff’s attempt to establish a causal
 26 nexus between music played during Floyd Mayweather’s entrance into the ring at two wrestling
 27 events and profits from videos of those events. *Dash*, 731 F.3d 303. Even though the infringing
 28 content was used in the video and was audible to consumers, the court found the infringing use

1 “form[ed] only a small, incidental portion” of the videos, and that it “defies credulity that a
2 consumer would purchase” the videos because of the infringing song. *Id.* at 332 (internal
3 quotation marks omitted).

4 *Mackie* and *Dash* undermine Rearden’s indirect profits claim. The list of elements that
5 could have contributed to consumer interest in the Motion Pictures is limitless: Each had stars,
6 scripts, other special effects, music, and costumes, to name just a few elements that consumers
7 could perceive with their eyes and ears in the finished Motion Pictures. A multitude of other
8 factors likewise could have caused people to see the Motion Pictures, including the genre (e.g.,
9 superhero or romance); that they were part of a series with a huge fan following (e.g., Marvel
10 Cinematic Universe); or, in the case of *Beauty and the Beast*, that the Motion Picture was a live-
11 action remake of an incredibly popular animated classic. Rearden can offer nothing but
12 speculation to show that people paid to see any of the Motion Pictures “because of” DD3’s
13 copying of MOVA into RAM. *See Mackie*, 296 F.3d at 916.

14 **B. Rearden’s Causal Nexus Claim Is Even More Speculative Than The Claims**
15 **Rejected In *Mackie* And *Dash*, Because No Consumer Ever Saw (Or Could**
See) The Ephemeral Copies Of MOVA Software Residing In RAM

16 The nexus between infringement and revenues in *Mackie* and *Dash* was hopelessly
17 speculative, but still was closer than the nexus Rearden alleges in this case. In those cases, the
18 infringing copy was or could have been seen (or heard) by prospective consumers. Rearden’s
19 theory is even more attenuated, because no consumer saw (or could have seen) the infringing copy
20 of MOVA software residing in computer RAM. Those copies simply could not have caused any
21 consumer to pay money to see any Motion Picture.

22 *Polar Bear Productions* is on point. In that case, Timex launched a promotional campaign
23 for watches that used infringing footage from the plaintiff’s video. *Polar Bear Prods.*, 384 F.3d at
24 714. The plaintiff claimed that Timex’s display of the infringing materials at trade shows and in
25 promotional materials generated excitement about Timex watches and “enhanced brand prestige”
26 that “translated into consumers purchasing Timex’s products” at other locations. *Id.* at 713–14.
27 The jury delivered a verdict for the plaintiff. The Ninth Circuit, however, even under a highly
28 deferential standard of appellate review, held that the plaintiff could not establish a causal link

1 between the trade show promotion and retail revenues. The court said there was no “evidence
2 establish[ing] that the infringement may have actually influenced the purchasing decisions of those
3 that bought [the infringer’s] watches at retail stores or other outlets.” *Id.* at 714–15. As in this
4 case, “[a]ctual retail purchasers were never exposed to the infringing images.” *Id.* at 715.

5 Here, MOVA is merely a software tool used as part of an elaborate creative process.
6 Rearden’s only infringement claim is for the copying of MOVA code into RAM, *but no consumer*
7 *sees (or could ever see) that copied code.* Even the tracked mesh—which is merely an output of
8 multiple processes, in which Rearden has no copyright—is not a part of any Motion Picture or
9 seen by any consumer.

10 If Rearden’s causal nexus theory were correct, the owner of software used to record and
11 process images of the *Mackie* artwork (or to lay out the brochure) would have an indirect profits
12 claim if the use of that software were unlicensed. Rearden’s theory stretches the concept of causal
13 nexus beyond the breaking point.

14 **C. Rearden Cannot Show Causation Because The Use Of The MOVA Software**
15 **Was A Preliminary Step In An Elaborate Process Of Creating A Motion**
Picture

16 Rearden’s causal nexus theory fails for yet another reason: The temporary copies of the
17 MOVA software code were an irrelevant byproduct of the software’s use (which is not protected
18 by copyright, *see* Section II.B, *infra*), and even the actual use of the software made only a minute
19 contribution to the completed Motion Pictures. That contribution was dwarfed by innumerable
20 other creative efforts, rendering Rearden’s indirect profits claim unduly speculative.

21 *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737 (D. Md. 2003), is
22 instructive. The defendant, a financial services company, distributed infringing copies of daily
23 stock market reports to its analysts. The analysts used the copied reports in formulating financial
24 advice for clients and in making daily investment decisions. *Id.* at 751. The court explained that
25 the infringing copies were “never distributed” to customers and were synthesized with “a variety
26 of other information” used to produce the firm’s profitable investment analyses. *Id.* at 751–52
27 (alteration omitted). The court rejected the plaintiff’s claim for revenues derived from the
28 defendant’s financial advice (which it earned by advising investors, buying and selling securities,

1 and managing customer assets), because “[t]he complex, variable, independent thought processes
 2 of hundreds of individual brokers intervene between the copying and any subsequent gain.” *Id.* at
 3 752; *see also Orgel v. Clark Boardman Co.*, No. 92-2, 1960 WL 8025, at *1 (S.D.N.Y. Nov. 29,
 4 1960) (rejecting causation where plaintiff argued that defendant’s copying of law treatise enabled
 5 him to increase the profits from his law practice; “[t]he subject is too remote and speculative to be
 6 susceptible of computation by a court”).

7 Here, Rearden has asserted that “the CG character as it appears in the film is the product of
 8 two processes: one to capture a live actor’s facial performance in a lifelike manner, and the other
 9 to create a CG model,” and that because both processes make “important contributions,” the
 10 involvement of pieces of MOVA software code in the former satisfies the causal nexus
 11 requirement.¹⁶ Rearden’s “contribution” theory overstates the significance of the temporary
 12 copies of MOVA software code and understates the innumerable processes (far more than two)
 13 that go into making the completed CG character (not to mention the full Motion Picture).

14 The creation of the temporary RAM copies was a byproduct of using the MOVA software.
 15 The copies did not represent the output of the program or the recorded facial performance. The
 16 software program itself only provided mathematical instructions for processing the captured
 17 performance into output files representing facial motion through data points. And even the output
 18 files consisted only of preliminary data, not anything that appeared in the completed Motion
 19 Pictures. The other elements and contributions to the CG character were numerous and complex.

20 Moreover, MOVA was not uniquely required even for the process of capturing facial data
 21 points and creating tracked meshes. Other facial motion capture technologies could have been
 22 used to do the same work.¹⁷ For this reason, it is entirely unsurprising that the amounts paid to
 23 DD3 for its facial motion capture services (which involved many non-MOVA elements) were a
 24 minuscule percentage of the overall special effects budget.¹⁸

25
 26
 27 ¹⁶ Letter Br. Re Filing of Causal Nexus Mot. (Dec. 21, 2018), Dkt. 127, at 6 (“Letter Br.”).

¹⁷ *See* Reed Dippo Decl. Ex. E (Li Dep. Tr. 81:18–25, 82:21–23, 86:19–22); Ex. F (Steele Dep. Tr. 124:8–125:2); Steele Decl. ¶ 3; Hendler Decl. ¶¶ 25, 47.

¹⁸ *See* Costa Decl. ¶¶ 4–5; Conmy Decl. ¶ 5; LaSalle Decl. ¶ 8; Steele Decl. ¶ 5.

Those facts, too, undermine Rearden’s causal nexus theory. Courts have stressed that “mere connection or usage alone” is “insufficient” to establish a causal nexus—even where the use was “critical” to the infringer’s business. *See Complex Sys., Inc. v. ABN Ambro Bank N.V.*, No. 08 Civ. 7497 (KBF), 2013 WL 5970065, at *5 (S.D.N.Y. Nov. 8, 2013) (collecting cases); *see also Point 4 Data Corp. v. Tri-State Surgical Supply & Equip., Ltd.*, No. 11 CV 726 (CBA) (RLM), 2012 WL 3306575, at *3–4 (E.D.N.Y. Aug. 13, 2012) (rejecting claim for indirect profits under Digital Millennium Copyright Act where defendant accessed plaintiffs’ software and used it for processing orders, invoices, financials, and inventories; notwithstanding that plaintiff’s “software was an important tool,” connection between the underlying act and defendant’s sales was “too speculative and attenuated” to permit award of indirect profits).

Any claimed connection between copying and indirect revenues is even more remote where, as here, other software programs could have provided the same functionality as MOVA. *Complex Sys., Inc.*, 2013 WL 5970065, at *11 (rejecting software owner’s indirect profits claim predicated on unlicensed use of software where, inter alia, other “processing software companies ... operate in the market” and “provide a certain basic set of functionality”) (quotations omitted); *Dash*, 731 F.3d at 332 n.18 (“Dash was required to show not merely that Appellees generated more revenue from playing ‘Yep’ than from playing no song, but that they generated more revenue from playing ‘Yep’ than from playing a non-infringing song.”).

Ultimately, DD3’s use of the MOVA software was only a small and non-essential part of DD3’s work, and pales in comparison to all the other work required to create the facial appearance and motion of the particular CG character—to say nothing of the completed Motion Picture.

II. REARDEN’S CAUSAL NEXUS THEORIES ARE BASED ON SPECULATION AND A MISUNDERSTANDING OF NINTH CIRCUIT LAW

In its prior filings and summary judgment discovery, Rearden previewed how it will seek to establish a causal nexus. None of its arguments satisfy its burden.

A. References To “MOVA” In Interviews, Articles, And Depositions Describing Particular Shots Do Not Establish A Causal Nexus

Rearden has argued that public statements in articles and YouTube videos about the Motion Pictures establish that the alleged infringement was a “driver[] of film attendance.”¹⁹ The sources Rearden cites either discuss the facial motion capture process generally (which includes a host of hardware and software processes other than the RAM copying of MOVA software), discuss numerous other elements of the Motion Pictures, or do not refer to “MOVA” at all. None of the sources Rearden cites refer to the copying of MOVA software at all. These facts simply confirm the futility of trying to show that DD3’s copying of MOVA software drove consumer purchasing decisions.

Rearden’s showpiece example—a YouTube video of a “Paris Press Conference” featuring the director and stars of *Beauty and the Beast*—proves these points. From this video, Rearden pulled quotations of actors Dan Stevens and Emma Watson and of director Bill Condon as lead examples in its complaint against Disney.²⁰ In the video, a reporter asks about motion capture technology generally, and Dan Stevens mentions “MOVA” one time in his response. But the three-minute discussion that ensues focuses on a range of topics having nothing to do with MOVA, including the actors’ skill in performing and in dealing with the challenging aspects of incorporating special effects; the body capture; the fact that Mr. Stevens did both facial performances and on-set walkthroughs of his action; and the fact that the producers built a separate “Beast” character to which Emma Watson read some of her lines. Mr. Stevens’s reference to “MOVA” was a shorthand reference to the entire face capture process, and neither he nor any other panelist said anything about MOVA software being responsible for the financial success of the Motion Picture. And the full video of this single press conference addressed numerous other topics, including the actor Luke Evans’s stage experience; the challenge of

¹⁹ Letter Br. at 6.

²⁰ FAC ¶ 2. The video is available at https://www.youtube.com/watch?v=R9mKV_gklgw&feature=youtu.be&t=12m14s.

1 “bring[ing] a new breath of fresh air to this classic and yet remain[ing] respectful to the
2 original”²¹; and the music and dancing in the Motion Picture.

3 Rearden’s written discovery requests suggest it will rely on the fact that, for some shots of
4 the Beast included in a *Beauty and the Beast* trailer, a corresponding capture of Mr. Stevens’s
5 facial performance had been conducted in the MOVA rig. Reed Dipppo Decl. Ex. G (Defendant
6 The Walt Disney Company’s Amended Objections and Responses to Plaintiffs’ First Requests for
7 Admission). Even if a tracked mesh from one of those sessions was used in the process of
8 creating a shot that appeared in the trailer, *none of those shots (or anything else any potential*
9 *customer saw) were infringing*. Rearden has a copyright only in the software—not in the tracked
10 mesh, not in any completed shot, and not in any image in any trailer or any completed Motion
11 Picture.²² Rearden cannot rely on the trailer (or anything else) to argue that prospective consumers
12 saw the allegedly infringing work or that the infringement drove their purchasing decisions.

13 In short, none of the articles, videos, or trailers Rearden relies on imply, much less
14 establish, any non-speculative connection between the narrow infringement that Rearden alleges
15 and the revenues it is trying to reach.

16 **B. Rearden Cannot Base Its Claim On DD3’s “Use” Of MOVA**

17 Rearden asserts that it can establish a causal nexus based on the fact that DD3 “used”
18 MOVA software “to capture an actor’s performance, and then to process the captured
19 performance.”²³ The theory fails, not only for the reasons discussed above, but also because
20 Rearden is conflating the “use” of the entire MOVA system with the specific act alleged to
21 infringe *copyright* (DD3’s making temporary copies of pieces of the MOVA software code in
22 RAM). Rearden has no copyright interest in the *use* of the MOVA system or even the use of the
23 MOVA software code.

24 The Copyright Act is clear: “In no case does copyright protection . . . extend to any idea,
25 procedure, process, system, [or] method of operation.” 17 U.S.C. § 102(b). In the context of
26

27 ²¹ Paris Press Conference, *Beauty and the Beast*, YouTube (Feb. 20, 2017)
https://www.youtube.com/watch?v=R9mKV_gklgw&feature=youtu.be&t=21m12s.

28 ²² Dismissal Order at 7–8, Dkt. 60.

²³ Letter Br. at 6 (emphasis added).

1 computer software, Section 102(b) “make[s] clear” that the particular form of “expression adopted
 2 by the programmer is the copyrightable element in a computer program,” but “the actual processes
 3 or methods embodied in the program are not within the scope of copyright law.” *Computer*
 4 *Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 703 (2d Cir. 1992) (quoting H.R. Rep. No. 1476,
 5 94th Cong., 2d Sess. 54, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5670); *cf. Apple Computer, Inc. v.*
 6 *Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994) (“Apple cannot” use copyright law to “get
 7 patent-like protection for the *idea* of a graphical user interface”) (emphasis added).

8 The process embodied in software is the proper subject of patent rather than copyright
 9 protection. 35 U.S.C. § 101 (a patent may be obtained for “any new and useful process”). But
 10 patent law would likely limit Rearden’s damages to the value of a “reasonable royalty”; and no
 11 case law would support Rearden’s patent-based claim to a portion of the ultimate profits of the
 12 Motion Pictures. 35 U.S.C. § 284; *see LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d
 13 51, 67 (Fed. Cir. 2012) (the “general rule” is that “royalties be based ... on the smallest salable
 14 patent-practicing unit”) (quotation omitted). Here, the available patent royalty would likely have
 15 been capped at the amounts that the Studios paid DD3 for its special effects services. That is
 16 presumably why Rearden chose to abandon its patent claims in this suit.²⁴

17 Rearden is relying on the use of the process embodied in the MOVA software code to
 18 make sweeping claims to Motion Picture profits. But only Rearden’s copyright claims remain
 19 live, and those claims involve only the temporary copies of MOVA software code in computer
 20 RAM. If Rearden can show copyright infringement, it may be entitled to the recovery of lost
 21 revenue (measurable based on what Rearden charged customers for MOVA services, or vendors
 22 for a license), or to statutory damages under 17 U.S.C. § 504(c). But Rearden is not entitled to a
 23 portion of Motion Picture profits based on DD3’s use of MOVA. *See Goldstein on Copyright*
 24 § 14.1.1.1 at 14:8, 14:12 (identifying “lost sales,” “a reasonable royalty,” or “market value” as the
 25 appropriate measures of damages).

26
 27
 28 ²⁴ Dkt. 93.

1 **C. Rearden Cannot Skip To The Apportionment Stage**

2 Rearden’s prior filings also argued that all of the elements besides the temporary RAM
3 copies of the software code are irrelevant to the causal nexus question, and instead are matters for
4 Defendants to prove in apportioning profits that are not attributable to the infringement.²⁵

5 Rearden has the burdens backward. Section 504(b) “creates a two-step framework for
6 recovery of indirect profits: [first,] the copyright claimant must first show a causal nexus between
7 the infringement and the gross revenue; and [second,] once the causal nexus is shown, the
8 infringer bears the burden of apportioning the profits that were not the result of infringement.”
9 *Polar Bear Prods.*, 384 F.3d at 711. Rearden must establish a causal nexus “*before* the parties can
10 wrangle about apportionment,” *Mackie*, 296 F.3d at 915 (emphasis added), and must do so based
11 on concrete, non-speculative evidence, *id.* at 915–16; 4 Nimmer on Copyright § 14.03[B][2][a].
12 Rearden cannot establish the required causal nexus and therefore never gets to the apportionment
13 stage.

14 **III. IN ADDITION TO BEING BASED ON SPECULATION, REARDEN’S INDIRECT**
15 **PROFIT CLAIMS FOR TRACK 1 MOTION PICTURES FAIL DUE TO THE DE**
16 **MINIMIS (OR NONEXISTENT) APPEARANCE OF CG CHARACTERS WHOSE**
17 **DEVELOPMENT INVOLVED ANY USE OF MOVA**

18 These cases concern six Motion Pictures, each alleged to contain one CG character for
19 which there is alleged to have been some use of MOVA software. Summary judgment for lack of
20 causal nexus is warranted for all six Motion Pictures for the reasons stated above.

21 Rearden also cannot establish a causal nexus for the four Motion Pictures in the “Track 1”
22 tier of discovery due to the de minimis or nonexistent use of MOVA.²⁶ They are (with one
23 exception) in Track 1 because of the very small amount of time the characters in issue appear on
24 screen. *See* Costa Decl. ¶ 2 (Thanos on screen for four seconds—in closing credits—of 141
25 minutes of *Avengers: Age of Ultron*; and for 39 seconds of two-hour *Guardians of the Galaxy*);
26 Nash Decl. ¶ 4 (Caesar bust on screen for 11 seconds of 98-minute *Night at the Museum: Secret of*

27 ²⁵ *See* Joint Am. Case Mgmt. Stmt. at 8–9 (July 18, 2018), Dkt. 97.

28 ²⁶ “Track 1” is intended to provide for narrow discovery and early mediation. Order Adopting
Discovery Plan at 1–2, Dkt. 113.

1 *the Tomb*). In the other Track 1 Motion Picture—*Fantastic Four*— the facial motion of the CG
 2 “Thing” character was not based on MOVA tracked mesh data. Ledda Decl. ¶ 4.²⁷

3 In the Track 1 Motion Pictures, not only are the temporary copies of MOVA software code
 4 and tracked mesh many creative steps removed from the ultimate character that appears on screen,
 5 but that character itself appears on screen only fleetingly (if at all). When “the infringing content
 6 forms only a small, incidental portion of the products that generated the claimed revenue streams,”
 7 it “defies credulity that a consumer would” base purchasing decisions on that content. *Dash*, 731
 8 F.3d at 332 (internal quotation marks omitted). The same can be said for *all* of the Motion
 9 Pictures. Notably, Rearden did not take a single deposition related to any of the Track 1 Motion
 10 Pictures. Rearden’s claims based on the Track 1 Motion Pictures simply demonstrates the extent
 11 of Rearden’s overreaching to seek a remedy that has no application to the facts of this case.

12 CONCLUSION

13 Rearden cannot proffer concrete, non-speculative evidence of a causal nexus between the
 14 temporary copies of MOVA software—which was not and could not be seen by consumers—and
 15 Motion Picture revenues. Even the *use* of the MOVA software (which is not protected by
 16 Rearden’s copyright) was a preliminary process that was superseded by numerous artistic and
 17 technical efforts and innumerable hours of additional work even to create a single CG character.
 18 For these and the other reasons set forth above, Defendants respectfully request that the Court
 19 grant partial summary judgment on Rearden’s indirect profits claim.

20 DATED: October 14, 2020

MUNGER, TOLLES & OLSON LLP

23 By: /s/ Ginger D. Anders
 24 GINGER D. ANDERS
 25 *Attorneys for Defendants*

26 ²⁷ Rearden apparently filed a copyright claim based on *Fantastic Four* because the MOVA logo
 27 appears in the DVD/Blu-ray featurette. The Fox group responsible for the featurette had no
 28 involvement in the motion picture process. It appears the featurette included the MOVA logo
 because DD3 provided a third-party vendor that produced the featurette with images of Jamie Bell
 that were not in fact used in connection with the CG character that appeared in the Motion Picture.
 Mulvihill Decl. ¶¶ 2–7; Ledda Decl. ¶¶ 3–5.